

The Honorable Benjamin Settle

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

JOHN DOE #1, an individual, JOHN  
DOE #2, an individual, and PROTECT  
MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as  
Secretary of State of Washington,  
BRENDA GALARZA, in her official  
capacity,

Defendants.

NO. 09-cv-05456-BHS

DEFENDANTS' RESPONSE TO  
MOTION FOR CONTINUANCE

**I. INTRODUCTION**

The plaintiffs have asked for a second continuance in the trial schedule. The plaintiffs have not shown good cause or due diligence. The current scheduling order was issued in January 2011, yet plaintiffs' lead counsel accepted a speaking engagement that conflicts with the date of the pretrial conference. Even with this voluntary conflict, the plaintiffs' local counsel has assured this court that he will be available for the scheduled court dates, including trial.

1 Since July 2009, the State of Washington's public records laws have been enjoined, to  
 2 prohibit release of the Referendum 71 (R-71) petitions. Dkt. 9. Extending the period of time  
 3 that the State's laws are suspended will unfairly prejudice the State and its citizens. Although  
 4 one of plaintiffs' four attorneys is no longer available, there is no justification for enjoining  
 5 State law for an additional period of time to accommodate the schedules of plaintiffs' three  
 6 remaining attorneys.  
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## 8 II. BACKGROUND

9 Plaintiffs are represented by lead counsel James Bopp, two of his associates, and local  
 10 counsel Steven Pidgeon. In conjunction with Mr. Bopp's application to appear pro hac vice,  
 11 Mr. Pidgeon filed a statement assuring the Court that he "will be prepared to handle this  
 12 matter, including trial" in the event that Mr. Bopp "is unable to be present upon any date  
 13 assigned by the court." Dkt. 10.  
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15 Trial was scheduled to begin on May 31, 2011, approximately one year after issuance  
 16 of the Supreme Court's decision. Dkt. 182. However, at the plaintiffs' request, the trial date  
 17 was continued four months. Dkt. 188, 191. The plaintiffs requested the continuance because  
 18 one of Mr. Bopp's associates was leaving the Bopp, Coleson & Bostrom law firm.<sup>1</sup> Dkt. 188.  
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20 The trial is now scheduled to begin on September 27, 2011. The case is ready to be  
 21 heard. The trial briefs, proposed findings and conclusions, and agreed pretrial order have all  
 22 been filed. The plaintiffs have requested a second continuance, because another associate is  
 23 leaving Mr. Bopp's firm, and Mr. Bopp has chosen to accept a speaking engagement that  
 24 conflicts with the date of the pretrial conference. Dkt. 263, 264.  
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26 <sup>1</sup> Over the course of the case, two of the State defendants' attorneys have also withdrawn. This includes the withdrawal of the State defendants' prior lead counsel, William Collins. Dkt 165, 217. The State defendants' have not initiated a request for continuance.

### III. ARGUMENT

Under Federal Rule of Civil Procedure 16(b)(4), a case schedule order “may be modified only for good cause.” Good cause exists if a scheduling deadline “cannot be met despite the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 Advisory Comm.’s Notes (1983 Am.). “Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). When the party seeking the extension cannot show due diligence, “the inquiry ends and the motion is denied.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

#### A. Plaintiffs’ Counsel Has Not Shown Due Diligence

This is the second time the plaintiffs have requested that the Court continue the trial date to accommodate their attorneys’ schedules. The parties cooperatively agreed to a thirty day continuance the first time Mr. Bopp wanted a continuance. Dkt. 188. The case was then continued four months. Dkt. 191. The request for a continuance was precipitated by precisely the same facts supporting this motion: the loss of one of four attorneys representing the plaintiffs in this case.

Plaintiffs continue to be represented by three attorneys, including lead counsel James Bopp and local counsel Steven Pidgeon. Counsel have a responsibility to appear, as required by the schedule. Local Rule 40(b). The current trial schedule has been in place since January 10, 2011, giving Mr. Bopp and Mr. Pidgeon ample time to arrange their calendars accordingly and prepare for trial. Dkt. 191. Mr. Bopp’s decision to accept a speaking engagement that conflicts with the date of the pretrial conference does not constitute good cause for moving the

1 trial date. On the contrary, counsels' lack of respect for the scheduling order demonstrates an  
 2 absence of diligence. The plaintiffs claim they do not know whether Mr. Pidgeon will be  
 3 available. Dkt. 262 at 2. In supporting Mr. Bopp's pro hac vice application, Mr. Pidgeon  
 4 assured the Court that he was "prepared to handle this matter, including trial" in the event that  
 5 Mr. Bopp "is unable to be present on any date assigned by the court." Dkt. 10.  
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7 Because the plaintiffs have not shown that they exercised diligence in ensuring that the  
 8 attorneys appearing for the plaintiffs would be ready to proceed to trial, the motion for  
 9 continuance should be denied. Fed. R. Civ. P. 16(b)(4); *Zivkovic*, 302 F.3d at 1087.

10 **B. Further Delay Would Prejudice The State, The Intervenors, And The Public**

11 Although a showing of prejudice is not required by Rule 16, prejudice supplies an  
 12 additional reason for denying a motion for continuance. *Coleman v. Quaker Oats, Co.*, 232  
 13 F.3d 1271, 1295 (9th Cir. 2000); *Johnson*, 975 F.2d at 609.  
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15 A second continuance, on the eve of trial, will place a significant burden on the State,  
 16 the Intervenors, and the public. For over two years, State law requiring public disclosure of the  
 17 R-71 petitions has been enjoined. As the Supreme Court has recognized, the State has an  
 18 important interest in preserving the integrity of the electoral process through the disclosure of  
 19 public records. *Doe v. Reed*, 130 S. Ct. 2811, 2819-20 (2010). Only through public disclosure  
 20 can citizens determine whether certain types of fraud occurred in the signature-gathering  
 21 process. *Id.* at 2820.  
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23 The unavailability of one of four attorneys for the plaintiffs is insufficient to justify the  
 24 burden on the State, the public, and the parties who have requested production of the R-71  
 25 petitions.  
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#### IV. CONCLUSION

It is the duty of the parties and counsel to comply with the schedule issued by the Court. Local Rule 40(b). Plaintiffs do not have good cause to justify their request that the Court, and the parties, alter the long-scheduled trial date to accommodate the calendars of the plaintiffs' three attorneys. If summary judgment is not granted, the case should proceed to trial as scheduled. Washington law should not be suspended longer to accommodate the personal preferences of attorneys who have made a commitment to abide by the Court's scheduling order.

DATED this 7th day of September, 2011.

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**CERTIFICATE OF SERVICE**

I certify that on September 7, 2011, I electronically filed the foregoing Defendants' Response to Motion for Continuance with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record.

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DATED this 7th day of September, 2011.

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